

MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017

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1 IN THE UNITED STATE DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF MICHIGAN
3 SOUTHERN DIVISION
4

5 CHAD MCFARLIN, individually
6 and on behalf of all
7 similarly situated persons,

8 Plaintiffs,

9
10 vs.

Civil Action No:
2:16-cv-12536

11
12 THE WORD ENTERPRISES, LLC,
13 et al,

HON. GERSHWIN A. DRAIN

14 Defendants.
15
16 _____/

17
18
19 The Deposition of MICHELE FOLLMAN was taken
20 before me, Barbara Phillips, (CER #5598) and Notary
21 Public, in and for the County of Washtenaw, State of
22 Michigan, at 221 N. Main Street, Suite 300, Ann
23 Arbor, Michigan, on Tuesday, December 5, 2017, at
24 1:45 p.m.
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MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017

2

1 APPEARANCES :

2
3 DAVID M. BLANCHARD (P67190)
4 221 N. Main Street, Suite 300
5 Ann Arbor, Michigan 48104
6 734-929-4313

7
8 Appearing on behalf of the Plaintiffs.
9

10
11 JEFFREY S. THEUER (P44161)
12 124 West Allegan Street, Suite 700
13 Lansing, Michigan 48933
14 517-482-2400

15
16 Appearing on behalf of the Defendants.
17

18 ** ** ** **

19
20 REPORTED BY: Barbara Phillips,
21 (CER #5598)
22 and Notary Public.
23

24
25 ALSO PRESENT: Kevin Dittrich

MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017

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I N D E X

WITNESS:

PAGE:

M I C H E L E F O L L M A N

Examination by Mr. Blanchard

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** ** *

E X H I B I T S

EXHIBITS:

PAGE:

Deposition Exhibit No. 25

51

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MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017

7

1 A. We use the tip credit to get them to minimum wage
2 with their compensation for their vehicle costs. So
3 not just the minimum wage, but with their costs
4 included.

5 Q. What components of the money that's given to the
6 drivers is intended to be a reimbursement for their
7 mileage?

8 A. It's the whole -- the package. Their wages, their
9 compensation per delivery and their tips.

10 Q. So are you saying that there is no specific portion
11 of a driver's money that they receive that's
12 intended to be reimbursement for driving expenses?

13 A. Can you ask that again one more time?

14 Q. Yeah. I want to get a clear answer and I want to be
15 clear about what the question is, too, so I'm not
16 doing the best job. Is there any particular piece
17 of the money that changes hands between the
18 defendant companies and the driver that's intended
19 and designated as reimbursement for the expense
20 incurred by the drivers?

21 A. That is only designated for that expense?

22 Q. That is designated at all or in part as
23 reimbursement for the expense incurred by the
24 drivers.

25 A. I would say yes.

MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017

9

1 A. Yes.

2 Q. Is there a variation in that from driver to driver,
3 5.25 or 5.50 or anything else?

4 A. No.

5 Q. So the -- that's fine. So flipping back. I don't
6 want to confuse you, but flipping back to talk about
7 this delivery fee that's paid. The cumulative of
8 those delivery fees are paid at the end of the night
9 for each driver, right?

10 A. Yes.

11 Q. And they're paid in cash; is that right?

12 A. Yes.

13 Q. Is there any withholding taken out of those?

14 A. No.

15 Q. Do you know does it show up anywhere on the
16 employee's paycheck?

17 A. No.

18 Q. Is the company contributing social security or FICA
19 or other portions of the employer's obligation of
20 taxes based on that cash compensation that's paid as
21 a delivery fee?

22 A. No.

23 Q. Is that delivery fee that's paid in cash and there
24 are no taxes taken out reported to the IRS on the
25 W-2 at the end of the year?

MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017

23

1 A. The regular wages would be the in store hours and
2 then the on the road hours.

3 Q. The cash wage?

4 A. The cash wage paid. The gross pay for those.

5 Q. Okay. Go ahead.

6 A. The credit card tips would be the reported credit
7 card tips that the computer kept track of. And then
8 the estimated cash tips is what we estimated based
9 on our findings of cash tips to be, what they should
10 have made for cash tips at that time period.

11 Q. So these three columns you just explained here are
12 in your formula considering the three parts of the
13 driver's wages; is that right?

14 A. Three parts, yes.

15 Q. And part of the driver's wages you're saying you
16 estimated?

17 A. The cash tips were estimated. We did not have
18 actual numbers for those, but we used a formula to
19 figure it out.

20 Q. Did you do tax withholding on the total of those
21 three columns?

22 A. On the regular wages and the credit card tips there
23 was tax withholding.

24 Q. And what is your basis for believing that the store
25 is entitled to count the tips paid by a customer to

MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017

25

1 20. It's definitely going to be a touchstone we'll
2 talk about today, but I wanted to direct you to
3 Exhibit 18 which is the minimum wage notice for
4 tipped employees. And Mr. Dittrich directed me to
5 you to ask some of these questions about this
6 notice. You already testified to it. We don't need
7 to repeat it all, but this is a notice that was
8 posted at each of the defendant stores, right?

9 A. Yes.

10 Q. And that was for a period of time that probably
11 would have been around 2014 to the end of 2015?

12 A. Yes.

13 Q. And then in 2016 the minimum wage went up. Was
14 there a new notice prepared in the same format as
15 this one and then pasted at the stores?

16 A. Yes.

17 Q. And then it's going up -- has it gone up from 8.50?

18 A. Yes.

19 Q. What's the current minimum wage?

20 A. 8.90.

21 Q. And when it went up to 8.90 was it the same -- well,
22 let me ask it, was there a similar notice posted
23 that has the 8.90 number on it?

24 A. I believe so.

25 Q. Was it made off the same template? Was it like the

MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017
26

1 exact same notice except just the number was
2 changed?

3 A. It's a part of our labor law poster.

4 Q. Oh, that says what the minimum wage is?

5 A. Yes.

6 Q. But I'm asking in the format of Exhibit 18 --

7 A. There is a portion on the labor law poster that has
8 the tipped wage information on it. It's in pretty
9 much the same format.

10 Q. Was there a version of Exhibit 18 that was posted
11 with the new rates that came out?

12 A. Yeah. I believe so, yeah.

13 Q. And it says here we apply the difference between
14 your regular hourly rate and 8.15 as a quote, "tip
15 credit" for each hour worked. That's the heart of
16 the tip credit, right, where a portion of the tips
17 get to be treated as wages?

18 A. Yes.

19 Q. And the amounts in this case when it was the 8.15
20 minimum wage, the amounts over 8.15 are tips from
21 the customer to the driver that belong to the
22 driver, right?

23 A. Yes.

24 Q. Exhibit 23 is this reimbursement sheet. Have you
25 seen that before?

MICHELE FOLLMAN
MCFARLIN vs WORD ENTERPRISES

December 05, 2017

57

1 A. Yes.

2 Q. So this is the pay period for July 14th. Driver
3 commission paid, we have \$85 here. It's not on
4 Exhibit 22. We've established that. And on Exhibit
5 25 for those two weeks you have \$48 plus 31.50 is
6 79.50 that shows up on Exhibit 25. And would I be
7 correct in assuming that the difference between
8 79.50 that shows up on there and the \$85 that you
9 have on your spreadsheet you created, Exhibit 20, is
10 because of the Laingsburg deliveries?

11 A. Yes.

12 Q. Cool. So we've talked about all these payment
13 components really on all these exhibits, but I'll
14 focus on Exhibit 20. All these different components
15 of compensation that you testified, is there any
16 particular one of them that the defendant can point
17 to as intended to reasonably compensate delivery
18 drivers for the expenses incurred in driving their
19 cars?

20 A. It is all a package deal.

21 MR. BLANCHARD: Thanks. I don't have anything
22 further. Do you want to follow-up?

23 MR. THEUER: No. I think I have nothing.

24 ** ** ** ** **

25 (Deposition concluded at 3:36 p.m.)